Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1850

KELLY MARTEN and KATHY MARTEN,
Petitioners,

vs.

FRED F. THIES, Director of the San Bernardino Department of Public Social Services,
Respondents.

Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of California

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FRED F. THIESS, Director of the San Bernardino County Department of Public Social Services,

Respondents.

Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of California

Respondent, Fred F. Thies, Director of the San Bernardino County Department of Public Social Services, a licensed adoption agency, respectfully prays that the Supreme Court deny a petition for writ of certiorari for review of the judgment of the California Supreme Court entered on February 20, 1980 denying petitioners' appeal from the decision of the Court of Appeal of the State of California, Fourth Appellate District, Second Division, filed November 29, 1979 and made final December 29, 1979.

Opinion Below.

Attached as Exhibit "A" to petitioners' petition for writ of certiorari.

Supreme Court jurisdiction is based upon 28 U.S.C. 1257(c) and is discretionary as to whether the court will grant a writ of certiorari to review a judgment of the Supreme Court of the State of California.

Questions Presented.

1. Whether foster parents with an expectation to be approved as adoptive parents have a right under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States to prior notice of the removal of a foster child when subsequent timely hearing and de novo judicial review are provided by state law.

2. Whether the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States was violated by the San Bernardino County Department of Public Social Services, a licensed adoption agency, in determining the best interests of the child relinquished to it for placement by adoption.

3. Whether the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States has been violated by California in the removal of a foster child whose custody rests in the adoption agency by state statute without appointing independent counsel for a three year old child.

Federal Question.

The federal question presented is whether or not the Due Process Clause of the Constitution of the United States requires in all cases prior notice to foster parents who have the expectation to adopt the foster child placed with them pursuant to agreement by an adoption agency when the agency determines that the best interests of the child will be served by removal from the foster home.

Legal Status of Petitioners Kelly and Kathy Marten.

Petitioners Kelly and Kathy Marten, then husband and wife, were foster parents to the child Sarah, who had been approved by the San Bernardino County Department of Public Social Services, a licensed adoption agency, for placement of the child. No petition for adoption had been filed by either of the petitioners Marten. The child was a relinquished child pursuant to California Civil Code Section 224m.

Statement of the Case.

Kelly and Kathy Marten, petitioners for certiorari to the United States Supreme Court, allege that they are "prospective" or "quasi-adoptive" parents of the child SARAH. This designation is incorrect. At no time did either Marten file a petition for adoption of the child. The legal status under the law of the State of California was that of foster parents; they were being considered as a possible adoptive placement for the child placed in their care.

In addition, the petition for certiorari at pages 4 and 5 failed to show the court the intensive social work performed by Social Worker Schneider, who made visits to the home on July 11, 1977, October 4, 1977, January 26, 1978 and April 5, 1978. Further, that Social Worker Schneider had visited the Marten's several times prior to approving them as applicants (for adoption) in January, 1976, and altogether had spent twenty (20) hours of intensive contact with the Marten's.

Social Worker Schneider interviewed the Marten's jointly on June 5, 1978 after Mrs. Marten returned to the State. The Marten's admitted to Mrs. Schneider at this time that they were having marital problems then, had had marital problems at the time SARAH was placed with them, and that they had been separated since January, 1978, and had no plan to seek marital counseling or to reconcile. Eva Schneider expressed to the Marten's her feeling that they had not honored their agreement with the Agency by reporting changes to the Agency, that they had thus acted dishonestly and that they had violated her trust in them for the sake of retaining physical custody of SARAH. The Marten's admitted that they had not informed the Agency of their changed situation out of fear that SARAH would be removed from them.

Eva Schneider advised the Marten's that she would have to seek consultation with her supervisors in the matter but *that removal of the child SARAH was a possibility at that time.*

Eva Schneider interviewed Mr. Marten alone on July 5, 1978. At that time he stated that if SARAH were to be removed from Mrs. Marten's home by the Agency, there would be no possibility of reconciliation, though he stated he loved Mrs. Marten. (Clerk's Transcript, pages 907 and 908.)

The County Adoption Agency thereafter sought a second opinion regarding the Marten's situation, and Mr. Bill Breer was assigned to review the matter. Mr. Breer was an adoption social worker with clinical experience in child psychology. He was of the opinion that the child SARAH suffered developmentally from the lack of a father figure in the home since January, 1978, and that greater difficulties would arise in the future due to this lack. Mr. Breer saw nothing to indicate that SARAH was physically suffering and he did say that SARAH appeared to be well cared for. Mr. Breer did apprise Mrs. Marten of the possibility that SARAH could be removed from her home, depending upon his recommendation.

Mr. Breer thereafter recommended that SARAH be removed from the Marten home based upon the foregoing observations, opinions and his professional judgment.

It was clear from the prior conduct of the Marten's in failure to inform the Agency of substantial difficulties in the placement and the removal of the child to one state while telling the Agency that the child was being taken to another state makes a reasonable conclusion that if prior notice of the action were given to the Marten's the substantial likelihood of their fleeing the jurisdiction and taking the child would be possible, if not probable.

A full and complete grievance review procedure held on September 11, 1978 (a copy of the Grievance Review De-

cision is attached as Appendix "A" and incorporated herein), wherein the Marten's were represented by counsel, ten (10) witnesses testified pursuant to Section 30684 of Title 22 of the California Administrative Code. The matter was thereafter taken on appeal by writ of administrative mandamus in Superior Court, wherein the court viewing the entire record found the findings of the review agent are supported by the weight of the evidence in the whole record; that the return of the child SARAH to petitioners would not be in the best interests of the child and, in fact, would be detrimental to the child; and that the court in exercising its independent judgment finds the findings of the review agent supported by the weight of the evidence submitted in the whole record.

Thereafter, petitioners sought appeal in the intermediate Appellate Court of the State of California. A copy of the opinion is attached as an appendix to petitioners' petition for certiorari in this court.

State Law.

The law of the State of California regarding the adoption of children relinquished to a licensed adoption agency is set forth in Section 224 et seq. of the California Civil Code. Section 224n of the California Civil Code reads:

> "The agency to which a child has been relinquished for adoption shall be responsible for the care of the child, and shall be entitled to the *exclusive* custody and control of the child at all times until a petition for adoption has been granted. Any placement for temporary care, or for adoption made by the agency, may be terminated at the discretion of the agency at any time prior to the granting of a petition for adoption. In the event of termination of any placement for temporary care or for adoption, the child shall be returned promptly to the physical custody of the agency."
>
> (California Civil Code 224n.)

California Civil Code Section 224n places the determination of removal of the child from a foster home which ex-

pects to adopt the child to the sound discretion of the adoption agency. This discretion is, of course, reviewable by judicial process under state law. *Rodriguez v. Superior Court,* 18 Cal.App.3d 510. Further, this concept of review by both administrative and judicial review is codified in California Administrative Code Title 22, Section 30684. (See Appendix 1 to petitioners's petition for certiorari.)

Full and independent judicial review by the Superior Court is authorized exercising its "independent judgment". See holding of C.V.C. v. Superior Court, 29 Cal.App.3d 909, 919. The courts of California exercised the power of review of the agency's discretion granted under Section 224n using the standard of the best interest of the child. See *Adoption of McDonald,* 43 Cal.App.2d 447, 458; *San Diego County Department of Public Welfare v. Superior Court,* 7 Cal.3d 1, 101 Cal. Rptr. 541; *Rodriguez v. Superior Court of Stanislaus County,* 18 Cal.App.3d 510.

California does provide substantial due process regarding the removal of a child from a foster home. In the case at bench a full and complete evidentiary hearing was completed and full independent review of the trial on the appellate level, ultimately the California Supreme Court refused to modify the opinion of the District Court of Appeal, who interpreting California Administrative law sustained the removal of the child on the grounds of imminent danger.

Justice Morris properly interpreted California Administrative Code 30684 when the issue of denial of due process was presented at the Court of Appeal. Here the Court said:

> ". . . The issue presented by the contention that the husband and wife were deprived of due process is whether there is substantial evidence to support the trial court's determination that the finding, that the Agency director had reasonable cause to believe the child was in 'imminent danger,' is supported by the weight of the evidence. We have concluded that there is.
>
> Husband and wife would have us define 'imminent danger' as 'immediate physical danger.' The term may not be so narrowly defined. The Administrative Code,

title 22, section 30684, subdivision (b) (2) defines the words 'Child in Imminent Danger' as 'A child whose health and safety are in jeopardy.' It seems clear that by so defining the term it was intended to include the 'risk' of injury or 'projected' danger as well as present or existing danger.

This is particularly so in view of the overriding statutory purpose of promoting the child's welfare. Where the agency reasonably believes that the child's health and safety would be endangered by prior notification of the agency's intent to remove the child, the agency is under a duty to withhold notification by reason of the overriding principle that it must act in the best interests of the child.

In this case the acting chief of adoptions presented the Agency's evaluation to Director Thies, and recommended that the child be removed forthwith, and that no pre-removal notice be given the husband and wife because to do so, in the Agency's judgment, would place the child in imminent danger because the wife was likely to flee with the minor child.

The evidence supporting the reasonableness of this belief consisted of: (1) the husband and wife's concealment of their marital differences in order to obtain the adoptive placement; (2) their failure to report their separation as required by their agreement with the Agency; (3) the wife's previous conduct in taking the child to an unauthorized destination out of state; (4) the wife's emotional instability and overdependence ont he child for her emotional needs; and (6) the fact that the fear of losing the child had been the stated reason for their untruthfulness and subterfuge. In view of this history the director's belief that the wife might flee with the child was clearly reasonable."

ARGUMENT.

I.

Foster Parents With an Expectancy to Adopt a Foster Child Do Not Have a Property Right Protected by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States Which Requires Prior Notice of the Removal of a Foster Child When Subsequent Timely Hearing and De Novo Judicial Review Are Provided by State Law.

The relationship between petitioners Marten and the child Sarah was initially created by the San Bernardino County Adoption Agency when, after study of the Marten's as a married couple living together, it was determined that the best interests of the child Sarah would be served by placement with the Marten's with the expectancy of a stable relationship between the couple and the creation of a permanent parent relationship by both parties with the child. It is clear that the adoption agency placing the child is bound by the statutes of the state and whatever rights the petitioners may have turns upon the law creating the placement.

This court has held that a mere expectancy does not create a "property" interest under the Fourteenth Amendment of the United States Constitution. See *Perry v. Sniderman*, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694, 2700.

The relationship of foster children and foster parents has been carefully reviewed by the Court in *Smith v. Organization of Foster Families for Equality and Reform*, 413 U.S. 816, 53 L.Ed.2d 14, 97 S.Ct. 2094, 2117 (1977). It seems clear from the *Smith* case that the United States Supreme Court is guided by the principle of law that the best interest of the child is considered paramount in the review of agencies decisions regarding placement and removal of children from their foster homes.

In the case at bench it cannot be argued that procedural due process was not provided under, first, administrative law, where petitioners were represented by an attorney at a timely hearing after the removal of the child, with a right to

judicial review and subsequent appealing to the highest court of the sovereign state. The issues of whether the whole record contained substantial evidence to support the judgment were clearly argued in the State courts, who found that substantial evidence supported the judgment of the agency that the best interest of the child would be served by removal from the home of Kathy Marten, and that the child would suffer detriment if required to remain in this broken home.

As in the *Smith* case, California confers the right on foster parents to adopt a child if the facts and circumstances demonstrate that the best interests of the child will be served by the completion of the adoption. In the case at bench, as indicated by the Court of Appeals, the child was used as a pawn between two parents seeking to hold a shaky marriage together rather than providing the child with a stable two-parent family wherein she could be raised in peace and security.

II.

Whether the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States Was Violated by the San Bernardino County Department of Public Social Services, a Licensed Adoption Agency, in Determining the Best Interests of the Child Relinquished to It for Placement by Adoption.

Petitioners seek in the United States Supreme Court a review of the evidence produced at the administrative hearing and trial court int he guise of an alleged violation of the Fourteenth Amendment to the Constitution. The argument of whether substantial evidence exists in the whole record rests in the sound discretion of the trial and appellate courts in the sovereign state. It does not appear from the record that the California procedure of administrative and judicial review denied the right to present evidence, have counsel appointed, and confront witnesses, and this court has held that in such cases, the court should abstain from extending federal jurisdiction in such proceedings. *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669; *Moore v. Simms* _____ _____99 Sup.Ct. 2371, 2383; *Goldberg v. Kelly,* 397 U.S. 354 (1970).

Much of petitioners' request for certiorari argues the importance of the relationship between parent and child, and it is clear that this court leading the judicial system of this country has long recognized the need of a young child for a stable relationship with two parents living together for the maximum development of the child's potential to be a healthy and productive adult.

The records of all states contain legal chronicles of the tragedy to young children who are shuffled between conflicting parents with disputes over custody, visitation and child support. For this court to determine that the child Sarah's best interests will be served by making her the pawn in the shaky Marten marital relationship would indeed be a gross injustice to the child. The record in this case is clear that the decision to remove the child was not taken lightly but was carefully considered by representatives of the adoption agency with years of experience and training in dealing with delicate relationships of parent and child.

It is significant that the case of *C.V.C. v. Superior Court*, 29 Cal.App.3d 909 was argued extensively in the California Supreme Court who chose not to overturn the Fourth District Court of Appeal's decision.

III.

Whether the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States Has Been Violated by a California Adoption Agency in the Removal of a Foster Child Whose Custody Rests in the Adoption Agency by State Statute Without Appointing Independent Counsel for a Three Year Old Child.

It is fundamental to the concept of representation by an attorney of a client, that the client must be competent to make known his wishes to the attorney who has a duty under the cannons of ethics to present the client's position to the court. Under California law, Civil Code Section 224n, when a child is relinquished to an adoption agency, that agency has *exclusive* custody and control of said child and is charged with the duty to find the best home for that child that it can. It would indeed be ludicrous to determine that a

three year old child who barely puts sentences together must have "independent" counsel. The practical effect of such a required appointment, on constitutional grounds, of a lawyer who may not be trained or experienced in the needs, wants or desires of the child. Under state law the agency is bound to represent the child.

REASONS FOR DENYING THE WRIT.

1. **The decision below complied with the Due Process Requirement of the Constitution of the United States. The decision of the Fourth District Court of Appeal interpreting California Administrative Code Title 22, Section 30684, is binding upon the courts and administrative agencies of the State of California by the failure of the California Supreme Court to overturn or modify its decision. The interpretation made by the Court of Appeal clearly turns on the review and a practical answer to be used in the administration of government in this state. Had the California Supreme Court wished to change the interpretation of administrative law made by the Fourth District Court of Appeal in the case of Marten v. Thies, it had such an opportunity. By the failure to grant a hearing, the Court has made the opinions of the Fourth District Court of Appeal the law in this State.**

2. **To grant certiorari in this case would throw substantial doubt on the power of adoption agencies to carry out their functions to determine permanent and stable homes for young children. Petitioners seek to have the child Sarah adopted into a family broken by divorce, where the child Sarah will be subject to the decrees of visitation, custody, child support, the impact of the remarriage of Kelly or Kathy Marten, adjusting to new step-fathers and step-mothers, which has in the opinion of experts already caused substantial harm to the child by the lack of a father-figure in the home.**

Conclusion.

It is respectfully submitted that no violation of the Constitution of the United States has been committed. Therefore, it is respectfully requested that a writ of certiorari in the United States Supreme Court be denied.

August 20, 1980

Respectfully submitted,

ALAN K. MARKS
County Counsel

RICHARD WM. STRONG
Deputy County Counsel

Attorneys for Respondents

APPENDIX A
Grievance Review Decision
INTER-OFFICE MEMO

Date: September 13, 1978
From: GRIEVANCE REVIEW AGENT: Michael Dimitry
PHONE: 3780 Program Monitor, Administrative Research and Planning Unit (ARPU) Department of Public Social Services (DPSS)
To: FRED THIES, DIRECTOR, Department of Public Social Services (DPSS)

Subject: GRIEVANCE REVIEW HEARING: FINDINGS AND RECOMMENDATIONS

Attached are my findings and recommendations in the matter of the GRIEVANCE REVIEW HEARING of September 11, 1978: MARTEN, Kelly and Katherine versus the County Adoption Service (CAS).

GRIEVANCE REVIEW

Hearing Date: September 11, 1978

Grievance Review Agent: Michael Dimitry, Program Monitor, Administrative Research and Planning Unit (ARPU), Department of Public Social Services (DPSS): 670 E. Gilbert Street, San Bernardino, CA 92404. (714) 383-3780.

Hearing Site: Department of Public Social Services, Fontana District Office, 17830 Arrow Blvd., Fontana, CA 92335.

Principals Attending Hearing:

1. **Name:** Marten, Kelly. **Address:** 5393 Evart, Montclair, CA 91763. **Phone #:** (714) 686-9874. **Status:** Claimant: Putative Adoptive Father.
2. **Name:** Marten, Katherine. **Address:** 5393 Evart, Montclair, CA 91763. **Phone #:** (714) 686-9874. **Status:** Claimant: Putative Adoptive Mother.
3. **Name:** Beltran, Steven P. **Address:** Legal Clinic of Jacoby & Meyers, 344 N. Brand Blvd., Glendale, CA 92103. **Phone #:** (213) 723-4153 or (213) 244-4177. **Status:** Attorney for Claimants (DPA 19 on File).
4. **Tiffany, Leona. Address:** 1400 W. 13th St., Space 187, Upland, CA 91786. **Phone #:** None. **Status:** Grandmother of Kelly Marten.
5. **Name:** Morua, Seferina. **Address:** 564 Texas St., Pomona, CA 91766. **Phone #:** (714) 629-6181. **Status:** Mother of Katherine Marten.
6. **Name:** Pederson, Gary. **Address:** 670 E. Gilbert St., San Bernardino, CA 92404. **Phone #:** (714) 383-2620. **Status:** Acting Chief, County Adoption Services.
7. **Name:** Sansone, Tom. **Address:** 670 E. Gilbert St., San Bernaridno, CA 92404. **Phone #:** (714) 383-2220. **Status:** Child Welfare Services Supervisor I, County Adoption Services.
8. **Name:** Breer, Bill. **Address:** 670 E. Gilbert St., San Bernardino, CA 92404. **Phone #:** (714) 383-1820. **Status:** Social Service Worker V, County Adoptions Services.
9. **Name:** Schneider, Eva. **Address:** 325 E. "C" St., Ontario, CA 91764. **Phone #:** (714) 988-1065. **Status:** Social Service Worker IV, County Adoption Services.

Subject of Hearing: 20-month-old relinquished minor, SARAH KELLY MARTEN, residing since 8-21-78 in the licensed foster home of Bill and Marilyn Evans.
MINOR'S DATE OF BIRTH: 1-24-77
STATE NO.: SBER 12, 178 ADA
COUNTY NO.: 264661

Legal custody of the minor resides with the San Bernardino County Adoption Services.

Issues Involved: Generally, the issue is whether or not the San Bernardino County Adoption Service acted properly in removing the minor Sarah Kelly Marten from her adoptive foster placement with the Martens on August 21, 1978, within the purview of a.) applicable statutory and regulatory law; b.) San Bernardino County Adoptions Services Agency policy; and c.) professional social work practice.

Specifically, the issues become whether or not:

A. The Agency had reason to believe that Sarah Kelly Marten was in fact a "Child in Imminent Danger — A child whose health and safety are in jeopardy", as defined under California Administrative Code, Title 22, Section 30684: GRIEVANCE PROCEDURES; and therefore

B. The Agency did act properly in not notifying the Martens of its intent to remove the child prior to doing so.

C. The Agency lawfully and properly exercised its discretion, granted under Section 224n of the California Civil Code, in terminating the adoptive placement prior to the granting of a petition for adoption.

D. The Agency, in taking the action described under "C" above, caused the Martens to suffer a "grievous loss" without procedural due process, the "grievous loss" in this instance being the loss of opportunity to file a petition for adoption of the subject minor.

SUMMARY STATEMENT OF THE FACTS.

(The following summary is based solely on the evidence and sworn testimony presented at the Grievance Review Hearing held on 9-11-78; this Hearing was held in accordance with County Operations Manual Section 22-000.1 (eff. 7/74), and with Section 30684 of Article 9, Subchapter 2, Chapter 3, Subdivision 4, Part II, Division 2, Title 22 of the California Administrative Code.)

1. Kelly and Kathy Marten were approved by the Agency as prospective adoptive parents in January, 1976, after a lengthy applicant study process by Social Worker Eva Schneider.

2. The Martens were visited in March, 1977 for a routine "Annual Update" of their applicant status by Social Worker Eva Schneider.

3. The subject minor, Sarah Kelly Marten, was placed with the Martens on a "quasi-adoptive" basis on May 17, 1977; minor was 15 weeks old. This child had been relinquished to San Bernardino County Adoption Service by the natural mother on March 24, 1977, the natural father on May 27, 1977, and the presumed father on April 1, 1977. An acknowledgement of the filing of these relinquishments was sent to San Bernardino County Adoption Services on June 8, 1977, thereby making the child legally free for adoptive placement by the County Adoption Service. The County Adoption Services division thus was given sole legal custody of the minor.

   The Agency accepted the relinquishments from the natural mother with the tacit agreement that the child would be placed in a stable, two-parent family, this being the mother's intent in relinquishing the child.

4. This placement was legally formalized as an adoptive placement on June 28, 1977.

5. Mr. and Mrs. Marten were admittedly experiencing "marital problems" of an unspecified nature during the month of May, 1977, prior to the placement.

6. The Marten's relationship improved temporarily but then again deteriorated to the point that they announced to their families on Christmas Eve, 1977, that they were going to separate. This announcement spurred Mrs. Tiffany, Kelly's grandmother, to warn the Martens at that time that their separation could jeopardize the placement of Sarah with them, stating that the Agency might remove Sarah if the Martens separated.
7. Despite Mrs. Tiffany's warning, the Martens separated in January, 1978, and contrary to their agreement with the Agency, did not inform the Agency of this change in their situation. Neither did the Martens seek help, professional or otherwise, for their marital problems.
8. After their separation, the Martens each dated other partners, although Mr. Marten continued to support Mrs. Marten financially. At the time of the Grievance Review Hearing, Mr. Marten was co-habiting with another woman, with the announced intention of continuing to do so indefinitely.
9. Wally Jordahl, Child Welfare Services Supervisor I with the County Adoption Services in the Ontario District Office *and* Eva Schneider's immediate supervisor at the time, received a phone call from an anonymous woman on 4-27-78. The anonymous caller reported that the Martens were separated, that there was cause for concern regarding the care being given to the minor, and urged that a social worker investigate the situation. This anonymous phone call thus served to *initiate* the investigation by the County Adoption Services.
10. Mrs. Marten was out of the State at the time of the anonymous phone call; she had apparently gone to Nebraska instead of Texas as she had informed the Agency, and was therefore technically out of the State without the Agency's consent or knowledge. Her misdirection of the Agency was intentional although her motivation is unknown.

11. Social Worker Eva Schneider made her final visit to the Marten home prior to initiating the adoption petition on 4-5-78. This was her fourth visit (home visits 7-11-77, 10-4-77, 1-26-78, 4-5-78) and fifth interview with the Martens since she had placed Sarah with them. Eva Schneider had also visited the Martens several times prior to approving them as applicants in January, 1976, and altogether had spent 20 hours of intensive contact with the Martens.

12. Eva Schneider interviewed the Martens jointly on 6-5-78, after Mrs. Marten had returned to the State. The Martens admitted to her at this time that they were having marital problems then, had had marital problems at the time Sarah was placed with them, and that they had been separated since January, 1978, and had no plan to seek marital counseling or to reconcile.

    Eva Schneider expressed to the Martens her feeling that they had not honored their agreement with the Agency by reporting these changes to the Agency, that they had thus acted dishonestly, and that they had violated her trust in them for the sake of retaining physical custody of Sarah. The Martens admitted they had not informed the Agency of their changed situation out of fear that Sarah would be removed from them.

    Eva Schneider advised the Martens that she would have to seek consultation with her supervisors in the matter *but that removal of the child Sarah was a possibility at this point.*

13. Eva Schneider interviewed Mr. Marten alone on July 5, 1978; at this time he stated that if Sarah were to be removed from Mrs. Marten's home by the Agency there would then be no possibility of reconciliation even though he stated that he loved Mrs. Marten.

14. County Adoption Agency supervisors and DPSS Administration requested that a second opinion of the social situation involving Mr. and Mrs. Marten, and Sarah, be obtained.

15. Mr. Bill Breer was assigned to provide the second opinion; on 7-24-78 he interviewed Mrs. Marten in the course of arriving at his psycho-social assessment of the situation. His impression was that Mrs. Marten was somewhat depressed, suffered from a high level of anxiety, had an immense over-investment in the child Sarah as her only source of affection, and felt "abandoned" by Mr. Marten. He noted that she continued to display a passive acceptance of her situation and continued dependence on Mr. Marten for financial aid. Mrs. Marten had suffered, he felt, a loss of financial support from her relatives. Mr. Breer felt that Mrs. Marten's reality situation was continuing to deteriorate in view of her statement that Mr. Marten would not make the house payment any more, in her belief. Since the separation Mrs. Marten had managed on financial contributions from Mr. Marten, and small money contributions from a neighbor and money and food from her mother. Since the separation she had only managed to be employed for one week. Mr. Breer noted that Mrs. Marten had no visible means of support, no significant work history or marketable job skills, no eligibility for welfare (in response to her query), was facing a period of instability, and ran a real risk of entering a marginal life of poverty.

Mr. Breer felt that, in his opinion as an adoptions social worker with clinical experience in child psychiatry, the child Sarah had suffered developmentally because of the lack of a father figure in the home since January, 1978, and that greater difficulties would arise in the future due to this lack. Mr. Breer saw nothing to indicate that Sarah was physically suffering or that she was in immediate danger; he did say that Sarah appeared well-cared for. Mr. Breer felt that Mrs. Marten displayed a lack of foresight, and was unrealistic in appraising her situation. Mr. Breer did apprise Mrs. Marten of the possibility that Sarah could be removed from her home, depending partially on his recommendation.

Mr. Breer ultimately did recommend that Sarah be removed from the Marten home based on the foregoing observations, opinions and professional judgements.

16. On August 21, 1978, social worker Eva Schneider and her supervisor Tom Sansone removed the child Sarah Kelly Marten from the home of Katherine Marten and placed her in a foster home pending re-placement in another adoptive home.

The child was removed under authority of California Civil Code Section 224n; no prior notice was given to the Martens as it was believed by the Agency that to do so would place the child in imminent danger.

This action was taken after the assessment of the case situation by Mrs. Schneider and Mr. Breer, and after presentation of their evaluation to the immediate supervisor, Mr. Tom Sansone, the Acting Chief of Adoptions, Mr. Gary Pederson, and the Special Services Programs Division Chief, Mr. T. Michael Decker. These latter individuals agreed that placement of the child Sarah was sufficiently deficient in several areas to warrant her removal from the Martens:

a.)The placement did not meet the Agency's perceived commitment to the natural mother to place Sarah with a *two-parent* family, the intent being that the two parents would reside together in a stable relationship and raise the child to the age of majority;

b.)The placement did not appear to be in keeping with Section 30627(c) of Title 22 of the California Administrative Code which clearly gives preference to two-parent families over single parent families in terms of accepting application for adoption and, in the Agency's interpretation, preference for placing children with two-parent families over single parent families, whenever possible;

c.)The placement did not have sufficient supports and resources to meet the child's continuing physical and emotional developmental needs.

The Acting Chief of Adoptions, Mr. Gary Pederson, presented the Agency's evaluation to the Director of the Department of Public Social Services, Mr. Fred F. Thies, and recommended that the child be removed forthwith, and further, that no notice of the removal be given to the Martens because to do so, in the Agency's belief and judgment, would place the child in imminent danger by virtue of the likelihood of Mrs. Marten to flee with the minor Sarah Kelly Marten.

Mr. Thies, based on the substantial weight of the evidence presented to him by the County Adoptions Services, found the child would be placed in imminent danger if notice were to be given, and formally directed that the child be removed from the Martens and that the Martens release the child to representatives of the County Adoption Service, in accordance with Section 224n of the California Civil Code.

17. On August 31, 1978, Kelly and Katherine Marten requested a Grievance Review Hearing by delivering a CWS/CAS-3 (7/74) "Request for Grievance Review" to the San Bernardino County Department of Public Social Services, and a Grievance Review Hearing subsequently scheduled and held on September 11, 1978.

FINDINGS.

The following findings are presented in the context of Section 30684 of Title 22 of the California Administrative Code, which requires that:

> All issues shall be considered in the best interests of the child.

All parties to the Grievance Hearing agreed at the beginning and at the close of the Hearing that the paramount concern was the well-being and best interests of the child, Sarah Kelly Marten.

A. Based on all the testimony and evidence given at the Grievance Review Hearing, it is found that the County Adoptions Services and the Director of the Department of Public Social Services, had sufficient and substantial cause to believe that the

child Sarah Kelly Marten was a child whose health and safety were in jeopardy, and that she was therefore in imminent danger; further, that the jeopardy would greatly increase were prior notice of the child's removal to be given to the Martens.

It seems clear that *in the absence of a filed petition for adoption,* that both Section 30684 of Title 22 of the California Administrative Code and Section 224n of the California Civil Code grant discretionary power to the Adoption Agency to determine if a child is in "imminent danger" or not, and to terminate the child's placement, or not. In the present case it was the individual and collective expert judgement of the Agency, acting in accordance with its practiced wisdom, that led it to believe Sarah Kelly Marten was in "imminent danger" and that her placement must then be terminated without notice. "Imminent danger" does not mean *necessarily* "immediate" danger, but carries the connotation of "projected" danger as well. It seems clear that both interpretations were intended in the construction of Section 30684; otherwise the word "immediate" would have been used instead of "imminent". The Agency's interpretation of "imminent danger" was therefore reasonable and correct, as was the subsequent action that it took based on this conclusion.

The Agency msut be guided in all its actions by the principle of doing that which is in the best interests of the child — that which will best meet the needs of the child, those needs being emotional, developmental, and physical. The Agency therefore has a *clear duty* to take steps to rectify any conditions or situation which does not meet the needs of the child, or is, or *could become,* detrimental to the child's well-being. The Agency can only accomplish this duty by exercising its

powers of judgment and discretion in *good faith* on behalf of the child, the child being the Agency's *primary client* in all such instances. It is found in the present instance that the Agency did indeed exercise its judgment and discretion in good faith.

B. Once the Agency has reached the conclusion that the child is in "imminent danger", or that the child could be placed in "imminent danger" by virtue of prior notification of the Agency's intent to remove the child, the Agency *is required* to withhold notification by the over-riding principle that it *must do* that which is int he best interests of the child. It would obviously not be in the best interest of the child to be placed in a situation of *increased* "imminent danger".

The interests of all parties are protected by the requirement that it is *the Director* who makes the finding of "imminent danger" or not, and consequently of notification or not, based on the weight of the evidence presented to him. The interests of the Martens were therefore considered regarding notification.

Therefore the Agency did act correctly within the law, Agency policy, and professional social work practice in withholding notification of the intended removal of the child, Sarah Kelly Marten, from the Marten home.

C. Section 224n of the California Civil Code is explicitly clear on the right of the Adoption Agency to remove a child *at its discretion* any time prior to the granting of a petition for adoption. No administrative hearing is required unless the child is considered to be in "imminent danger", and no judicial hearing is required in any case where a petition has not been filed.

It seems clear that the Agency lawfully and properly exercised its discretionary power granted by Section 224n of the California Civil Code.

D. The core of the Martens' arguments against the actions taken by the County Adoption Agency is that they have suffered a "grievous loss" without procedural due process because the agency removed the child from their home, and because the Agency did not notify them of its intent to do so. The Martens assert that the "grievous loss" is compounded by their biological inability to bear children. They further asert that removal of the child from them has caused her emotional injury because of the precipitous separation from her parents.

The Martens argue that their right to an administrative hearing was abrogated by the action of the Agency, and that the actions taken by the Agency in removing the child Sarah Kelly Marten were motivated only by "administrative convenience" and not by the concern of the Agency for the child or for them, and that the actions were arbitrary.

The weight of the evidence supports the argument that the action taken by the Agency in removing the child from the Martens was *not* precipitous, and that the withholding of notification was not arbitrary, but rather motivated by the overriding concern of the Agency for the well-being and protection of the child.

The Martens arguments expressing their concern that separation of the child from them by the Agency has and will cause the child "irreparable injury" are negated by their own actions in January 1978, when Mr. Marten left the home. His departure in itself constituted a separation trauma for the child; maintenance of the separation with *no* action taken by the Martens to resolve their marital problems indicates an immature and callous disregard for the emotional developmental needs of Sarah Kelly Marten, the Martens protestations not withstanding. Mr. Marten's

living arrangement with his paramour at the time of the Hearing, and his avowed intention of continuing to do so, speak eloquently to this point.

The argument that the Agency undertook the removal of Sarah Kelly Marten without a prior administrative hearing and without notification of intent merely as an "administrative convenience", is spurious. It was clearly shown that the Agency, because of the gravity of the contemplated action, went to great lengths to assess the situation before taking what it considered to be drastic and irrevocable steps to insure the well-being of the child, not only in the immediate future, but for the child's life to the age of majority. There were several case consultations between the assigned social worker and her supervisor, the Acting Chief of Adoptions and the Director, and with another social worker, Mr. Breer, who was requested to provide a second, objective assessment and recommendation based on a review of the case record and an interview with Mrs. Marten.

The Agency first began contemplating removing the child on 6-5-78 when Mrs. Schneider interviewed the Martens jointly; she informed the Martens then of this possibility. Mrs. Schneider again warned Mr. Marten on July 5, 1978 of this possibility. Mr. Breer advised Mrs. Marten of this possible eventuality on July 24, 1978 when he interviewed her. The Martens clearly had intimations of the impending removal of the child.

Based on the findings previously stated that the Agency properly and correctly acted on its judgment that the child was in "imminent danger", the argument that the Martens were deprived of procedural due process is negated, *especially* in the absence of the filing of a petition for adoption.

The Martens' concern over their "grievous loss" and "deprivation without due process" is curious in the light of the fact that they themselves took no action to protect their interest in the child. Had they simply filed a petition for adoption of the child their interests, in their view, could have been subjected to an independent judicial review *prior* to any removal of the child. The Martens consulted an attorney, Mr. James Banks, but took no action. In fact, the Martens could conceivably have filed a petition as early as December, 1977, but instead chose to announce their imminent marital separation at that time.

Any reasonable and prudent person would have taken some steps to protect his interests against grievous loss but the Martens chose only to willfully withhold from the Agency information regarding their separation and to continue to intentionally deceive the Agency for six months — until 6-5-78; this deception indicates a knowledge by the Martens that they were aware that their interest in the child could be threatened if the Agency found out. And yet they took no action — neither to resolve their situation nor to protect their interest in the child by filing a petition for adoption.

Thus it is found that the Martens were not denied an opportunity to file a petition of adoption for this child by the action of the Agency, nor did they suffer a "grievous loss" thereby; opportunity existed in plenty for the Martens prior to the Agency action on 8-21-78.

The Agency has announced its willingness to accept and consider an application by Mr. and Mrs. Marten for a single parent adoptive placement for a child ten years of age or older.

It is the intent of the County Adoption Services to re-place Sarah Kelly Marten in another two-parent, stable family home as the Agency feels very trongly that *this* is in the best interest of the child.

It is the finding of this Grievance Review Agent that it is *the child* Sarah Kelly Marten, as is so often the case, who has suffered a tragic loss of almost nine critical months of her development due to the separation of the Martens; and it is *the child* who must bear the trauma of separation and replacement because of the unrealistic and irresponsible actions of Mr. and Mrs. Marten.

RECOMMENDATIONS.

It is respectfully recommended that:

A. The Director of the San Bernardino County Department of Public Social Services uphold the findings detailed above, and that

B. The County Adoption Services continue to offer either direct services or referral to appropriate counselling services to Mr. and Mrs. Marten, unless such services are explicitly refused by the Martens, and that

C. Such offer of services be accomplished through the person of a new social worker heretofore not connected with this case.

Respectfully submitted,

Mr. Michael Dimitry
Program Monitor
Administrative Research and Planning Unit

Reviewed and Approved:

Fred F. Thies, Director
Department of Public Social Services

ATTACHMENT VII.

30679. Referrals. Data on children ready for placement shall be entered in the referral system for matching. Printed possible referrals of applicants for children and of children for applicants shall be forwarded to agencies by the referral system. Action shall be taken and reports sent to the ARRC by agencies within the time limits established by the State Department of Health.

History: 1. Amendment filed 2-8-78; effective thirtieth day thereafeter (Register 78, No. 6).

30681. Discontinuance Notifications. The agency shall discontinue the registration immediately when a placement is made or a child or applicant is no longer available for another reason. Discontinuance forms will be provided by ARRC.

History: 1. Amendment filed 2-8-78; effective thirtieth day thereafter (Register 78, No. 6).

30683. Cooperation With Adoption Resource Exchange of North America. California applicants have priority for palcement of California children. Cooperative placements through the Adoption Resource Exchange of North America may be considered if no home is available in California for a child or if there is no child for an applicant.

History: 1. Amendment filed 2-8-78; effective thirtieth day thereafter (Register 78, No. 6).

Article 9. Grievance Procedures — Relinquishment Adoption Program

30684. Grievance Procedures. (a) Each public and private licensed adoption agency shall make provision for the review of complaints by adoptive parent(s) as related to the placement, care, or removal of children from an adoptive home. All issues shall be considered in the best interests of the child.

(b) **Definitions.**

(1) **Grievance** — A grievance is a complaint or expression of dissatisfaction about procedures or actions taken by an adoption agency relating to an adoptive home placement.

(2) **Child in Imminent Danger** — A child whose health and safety are in jeopardy.

(3) **Grievance Review Agent** — A person or panel designated by the director of the local agency to conduct the grievance review and render a recommended decision to the director of the agency.

The agent need not be employed by the agency but shall be:

(A) Person(s) not involved in the action complained of,

(B) Person(s) not directly in the chain of supervision of any of the persons involved in the action complained of, with the exception of the director or his chief deputy, and

(C) Person(s) knowledgeable of the field and capable of objectively reviewing the agency action complained of.

(4) **Parties to Grievance Review** — The adoptive parent(s) requesting the review and the agency responsible for the action complained of.

(5) **Adoptive Parent(s)** — Person(s) with whom a licensed adoption agency in California has placed a child for adoption and for whom an adoption petition has not been filed.

(6) **The Representative** — An individual, including an attorney at law, relative, friend, or other person authorized in writing by the complainant or by the agency to act for and represent a party to the review in any and all aspects of the hearing.

(c) **Notification of Grievance Review Procedures.**

(1) Adoptive applicants shall be informed during the home study that in the event there is dissatisfaction with an administrative action taken by the agency after the placement of a child in the home they have a right to a grievance review.

(2) Adoptive applicants shall be given a copy of the agency procedures during the home study.

(3) The adoptive placement agreement shall include a statment referring to the rights to a grievance review.

(d) **Notification of Intent to Move Child.**

(1) **Advance Notice Requirements.** The adoptive parent(s) shall have not less than seven calendar days' written notice of the agency's intention to remove a child placed in the home. The exceptions are when:

(A) The agency director has reasonable cause to believe the child is in imminent danger, the child may be removed without prior notice but within seven days written notice shall confirm reasons for removal, or

(B) The agency and adoptive parent(s) by mutual agreement approve removal of the child.

(2) The notice shall contain the date of the intended removal, the reasons for the removal, and the right to a hearing prior to removal as provided in Section "F" of these regulations.

(e) **Persons Entitled to Grievance Review.**

(1) Any adoptive parent(s) dissatisfied with any agency action relating to a child placed in his home for adoption and for whom an adoption petition has not been filed may request a review of the agency decision.

(2) **Exceptions.** No grievance review under this procedurel be granted on the following cases.

(A) The removal of a child resulting from a court order.

(B) A complaint involving only a question regarding the validity of a law or departmental regulation.

(C) Any issue for which a fair hearing is available pursuant to Welfare and Institutions Code Sections 10950 through 10963.